90-1238

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

LESLIE R. DERSTEIN,

Petitioner,

v.

PAGE BENSON, J. PATRICK BRAZIL

and JOHN JAWORSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the pretermination due process requirements of notice, explanation of the evidence, and an opportunity to respond are satisfied where a public employee confronts a general accusation, such as sexual harassment, but is not informed of any specific allegations, and is given ten days in which to resign or be fired?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Leslie R. Derstein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on November 1, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, reported at 915 F.2d 1410, appears in the appendix hereto.

The memorandum decision of the United States District Court for the District of Kansas, reported at 714 F.Supp. 481, appears in the appendix.

JURISDICTION

On May 22, 1989, the District Court for the District of Kansas granted judgment to petitioner on his claim of denial of due process. On respondent's appeal, the Court of Appeals for the Tenth Circuit entered a judgment on September 28, 1990, reversing judgment in favor of petitioner and remanding the case to the District Court. The case was not remanded to determine any factual issues.

The Court of Appeals denied a timely petition for rehearing on November 1, 1990, and this petition for certiorari was filed within ninety days of the subsequent judgment entered on the rehearing.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment XIV:

> No state shall...deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subject, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

STATEMENT OF THE CASE

Jurisdiction of the district court was invoked under the fourteenth amendment and 42 U.S.C. § 1983, and under U.S.C. §§ 1331 and 1343. Petitioner sought damages in the United

States District Court for the District of Kansas for the deprivation of due process and for injuries resulting from his employment termination.

Following trial to the district court, judgment was entered for petitioner. The district court's memorandum decision addressed each issue raised at trial, and specifically held that petitioner Derstein was denied his right to pretermination due process. The Tenth Circuit reversed this ruling, finding that petitioner received due process prior to his termination.

At the time of the discharge, in May of 1981, petitioner had been employed with court services for approximately ten years, and held the position of Assistant Director of Court Services for the Thirteenth Judicial District. Respondent Judge Page Benson was a District Judge and Administrative Judge of the Thirteenth Judicial District. Respondent J. Patrick Brazil was a District Judge, and respondent John M.

Jaworsky, an Associate District Judge, in the Thirteenth Judicial District.

Some time in mid-April, 1981, the District's Court Administrator, Steve Seyb, heard a rumor that a probation officer (Sharon Neria) intended to contact an attorney about bringing a sexual harassment lawsuit involving Derstein. The Personnel Officer of the Kansas Judicial Administrator's office (Marjorie Van Buren) was contacted for help.

Van Buren conducted interviews of Sharon Neria and persons whose names were provided by Neria. Some of these interviews were taped. She did not contact Derstein, Derstein's former supervisor, or the other juvenile probation officer who worked with Derstein. (Tr., pp. 565-566).

On May 6, 1981, Van Buren met with Seyb and Judges Benson, Jaworsky and Brazil. She reviewed her taped recordings which had been transcribed. She stated her conclusion that Derstein was guilty of sexual harassment and her

conclusion that under the personnel rules sexual harassment constituted a "serious and grievous offense," for which a tenured employee such as Derstein could be immediately terminated.

The decision to terminate Derstein was made during this meeting on May 6, 1981. Later that day, a note was sent by Seyb to Derstein asking him to meet with Judge Benson and Seyb the following morning. Prior to this meeting, Derstein did not know of Van Buren's investigation or the meeting of the Judges on May 6, 1981. Derstein was not told the reason for the meeting. He believed it to be in response to an unrelated request of his to meet with Judge Benson.

Present at the May 7, 1981 meeting were Seyb and Judges Benson, Brazil and Jaworsky. Judge Benson advised Derstein that a court services employee had threatened to seek counsel and bring a sexual harassment suit against the state, and as a result, an investigation had been conducted which revealed that Derstein had

been involved in verbal and physical sexual harassment over a period of years. Judge Benson informed Derstein that he had ten days in which to resign or be terminated. (Tr., pp. 127-128).

Derstein denied wrongdoing, asked who had made this claim, and what he had done. In response, Judge Benson told him only that Sharon Neria was the person threatening a lawsuit. Seyb responded that Derstein had been involved in "unprofessional behavior." (Tr., p. 128). Derstein was informed that following his termination he would have an opportunity to appeal the decision and would then be given a hearing. Respondents testified that they expected Derstein would have a hearing on the facts at a post-termination appeal stage. (Tr., pp 589, 624, 671).

The meeting lasted approximately 15 minutes. At trial, Seyb testified that when the decision was made to terminate Derstein and to call him into Judge Benson's office to inform him of that decision, no one intended or planned

to get Derstein's side of the story. (Tr., p. 506). Judge Brazil acknowledged that Derstein asked several questions during the meeting on May 7, 1981, to which no response was given. (Tr., p. 603).

Following this meeting, Derstein tried unsuccessfully to obtain a copy of Van Buren's investigation transcript. He approached Judge Benson for a copy and was told that he should see Seyb. Seyb sent him to Van Buren, who referred him back to Judge Benson. (Tr., pp. 133-134). Derstein received a copy several years after his termination. (Tr., p. 134). Derstein also hired an attorney who tried to dissuade Judge Benson. The attorney concluded that his role was to respond to whatever action Judge Benson took.

Derstein refused to resign, and on May 17, 1981, he received a termination letter. The letter stated that his discharge was the result of information indicating "an identifiable pattern of sexual harassment of female employees

of the Unified Court System over an extended period, which constitutes a grievous offense."

The termination letter also advised Derstein of his right of appeal, which he undertook. The language of his appeal letter, however, was deemed by an appeal board to raise only a legal issue of whether sexual harassment was a serious and grievous offense under personnel rules. The Board viewed the appeal language as not challenging the factual allegation of sexual harassment, and therefore determined that no hearing was justified. Derstein filed a motion stating he intended to challenge the factual basis for the sexual harassment accusation, but did not know the factual allegations. He requested that the appeal board set aside this order and grant him a hearing on the merits. This motion was denied.

At trial, Derstein sought to prove that his discharge did not satisfy pretermination due process, and that his termination was

unjustified. In seeking damages resulting from unjustified termination, Derstein challenged specific charges contained in Van Buren's transcribed interviews. None of the interviewees testified at trial.

In its memorandum decision, the District Court held that Derstein was not given an opportunity to present his side of the story, and could not have adequately responded if given the opportunity since he was never advised of the charges against him. (app., pp. A68-A69). The District Court found that the respondents did not intend to provide Derstein with a copy of the investigation transcript or with a pre-termination explanation of the evidentiary basis for his discharge. (app., p. A77). The District Court further found that Derstein substantially disputed the specific allegations of harassment contained in the investigation transcripts. (app., p. A83).

In reversing these rulings, the Tenth Circuit's opinion addressed Derstein's

procedural due process claim and concluded that pretermination procedural due process was provided. The Tenth Circuit opinion holds that the meeting on May 7, 1981, between Derstein, Seyb and respondents, constituted a pretermination hearing. (app., p. A14). The Tenth Circuit further holds that the ten days Derstein was given in which to resign or be terminated constituted an opportunity to respond and relate his side of the story. (app., p. A15). The Tenth Circuit also made its own finding that Derstein never contested, even after examining the investigation transcripts, the factual basis for his alleged sexual harassment. (app., p. A17).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE MINIMUM NECESSARY REQUIREMENTS FOR SATISFYING PRE-TERMINATION DUE PROCESS.

The court below holds that pre-termination due process is satisfied by telling an employee that he has been the subject of a rumor by another employee, that an investigation has revealed his guilt of general behavior such as sexual harassment, and that he has ten days in which to resign or face termination. In so holding, the Tenth Circuit opinion is in clear conflict with decisions of this Court, including the decision of Cleveland Board of Education v. Loudermill, 470 U.S. 582 (1985).

The impact of the Tenth Circuit's decision will be felt far beyond the particular injustice done to petitioner Derstein. Attempts by the Kansas Trial Lawyer's Association and the American Civil Liberties Union to participate in *en banc* review is an indication of the widespread concern with the Tenth Circuit's opinion.

The opinion below poses an insurmountable problem for public employees who are confronted with a termination based on a generalized

accusation, such as sexual harassment. A public employee, such as petitioner, faces untenable alternatives. If the general accusation is deemed to constitute sufficient notice and explanation of the charges, and if the accusation is denied, the employee can be said to have had the opportunity to respond. With no knowledge of the factual basis relied upon by the employer, the employee is unable to adequately respond.

Following the court of appeals' reasoning, accusations of general behavior which would satisfy due process are limited only by one's imagination. A public employer may simply charge that the employee is unprofessional, irresponsible, or untrustworthy, and the employee will be unable to adequately respond. By denying that he or she is untrustworthy, however, the employee will be considered to have had the opportunity to respond. The result makes a mockery of the fundamental guarantees of due process.

The opinion below poses an additional insurmountable problem for public employees who confront the discharge ultimatum: resign by a time certain or face termination. If the time which the employee is given to make this decision constitutes by definition an opportunity to respond, the burden of providing a procedural avenue for responding to charges is transferred to the employee, where it does not belong. The employee has not been invited to respond, but rather has been invited to resign to avoid the stigma of an outright discharge. Respondents did not invite Derstein to factually respond during the ten day period. Rather, they looked to the post-termination process for a hearing on the facts.

The Tenth Circuit has misapplied the essential elements of pre-termination due process identified in Loudermill:

> the tenured public employee is entitled to oral or written notice of the charges against him, an

> explanation of the employers' evidence, and an opportunity to present his side of the story.

470 U.S. at 546. In misapplying this standard, the court below has ignored the underlying purpose of pre-termination due process. This Court recognizes a pre-termination hearing as "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U.S. at 545-546. Where the factual allegations of an *ex parte* investigation are not shared with the employee prior to his termination, there is no check against mistaken decisions.

This Court's plurality opinion in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987), also recognizes the importance of procedures which promote the reliability of pre-deprivation determinations. 481 U.S. at 265-266. In Brock, an employer was confronted, after a governmental

investigation in which information was not disclosed, with the determination that it retaliated in discharging an employee. In holding that the employer was not provided minimum predeprivation due process the Court characterizes the pre-termination due process decisions of Loudermill and Arnett v. Kennedy, 416 U.S. 134 (1974):

> these cases reflect that the constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges, but also of the substance of the relevant supporting evidence.

481 U.S. at 264-265. The opinion below holds otherwise, and sanctions the use of conclusory accusations as a substitute for notice of charges and an explanation of the evidence. Under the Tenth Circuit's analysis, due process

ceases to be a dynamic process promoting fundamental guarantees of fairness and reliability. A unilateral procedure which does not require the exchange of information or explanation of the evidence, and which equates a "quit or be fired" ultimatum with the opportunity to respond, is a sham of due process. It is fertile ground for mistaken decisions.

This Court should not be mislead by the Tenth Circuit's finding that Derstein never contested the factual basis for his alleged sexual harassment following his termination (app., p. A17). The Tenth Circuit has made an impermissible factual finding which should not divert this Court's attention from the issue at hand. Attention should remain firmly fixed on the constitutional adequacy of the pre-termination procedures sanctioned by the Tenth Circuit.

For the record, the Tenth Circuit's factual finding is contrary to the evidence, does not

address the district court's findings, and does not comply with the clearly erroneous review standards of Fed. R. Civ. P. 52(a). The first supporting evidence for the accusation of sexual harassment which Derstein received was Van Buren's transcript. Derstein did not receive the transcript until several years after his termination. He challenged factual allegations contained in the transcript at the only hearing he ever received, at the trial below.

Before receiving the transcripts, petitioner Derstein was given no information or supporting evidence to respond to. His plight is the plight of every public employee who must confront and respond to only a general accusation of misconduct. The opinion below sanctions and encourages the use of such tactics by public employers. The Tenth Circuit precedent squarely conflicts with the decisions of this Court, and with the purpose of due process, and justifies the grant of *certiorari* to review the judgment below.

CONCLUSION

For all the foregoing reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

No. 89-3171

& 89-3198

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LESLIE R. DERSTEIN

Plaintiff-Appellee

Cross-Appellant

VS.

THE STATE OF KANSAS, MARJORIE VAN BUREN,

STEVEN SEYB, HERBERT W. WALTON, KAY FALLEY,

JESS L. DANNER,

Defendants,

AND

PAGE W. BENSON, J. PATRICK BRAZIL,

JOHN M. JAWORSKY,

Defendants-Appellants,

Cross-Appellees

ORDER

Filed November 1, 1990

Before: Chief Judge, Seth, McKay, Logan Seymour, Moore, Anderson, Tacha, Baldock, Brorby, and Ebel, Circuit Judge and Kane,* District Judge.

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*Honorable John L. Kane, Jr. United States District Judge for the District of Colorado, sitting by designation.

Plaintiff-Appellee/Cross-Appellant Derstein's petition for rehearing is denied by the panel of judges that rendered the decision sought to be reheard.

Pursuant to Federal Rules of Appellate Procedure 35(b), the suggestion for rehearing en banc was transmitted to the panel and the judges of the court in regular active service. No judge having called for a poll, the suggestion for rehearing en banc is also denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By Patrick Fisher

Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

89-3171

89-3198

LESLIE R. DERSTEIN

Plaintiff-Appellee

Cross-Appellant

VS.

THE STATE OF KANSAS, MARJORIE VAN BUREN,

STEVEN SEYB, HERBERT W. WALTON, KAY FALLEY,

JESS L. DANNER,

Defendants,

AND

PAGE W. BENSON, J. PATRICK BRAZIL,

JOHN M. JAWORSKY,

Defendants-Appellants,

Cross-Appellees

On Appeal from the United States District Court
for the District of Kansas
(D.C. No. 84-1219-K)

Filed September 28, 1990

Brian G. Grace, Wichita, Kansas, for Plaintiff, Appellee, Cross-Appellant.

Carl A. Gallagher, Assistant Attorney General (Robert T. Stephan, Attorney General, and Nancy L. Ulrich, Assistant Attorney General, with him on the briefs), Topeka, Kansas for Defendants, Appellants, Cross-Appellees.

Before TACHA and SETH, Circuit Judges, and KANE, District Judge*.

SETH, Circuit Judge.

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*Honorable John L. Kane, Jr., United States District Judge for the District of Colorado, sitting by designation.

Plaintiff, a former court services officer, brought this civil rights action pursuant to 42 U.S.C. 1983 against three state district court judges alleging he was unlawfully terminated of employment in response to allegations of sexual harassment. The crux of plaintiff's complaint is that the circumstances of his discharge violated his liberty and property interest without due process of law.

After a bench trial, the district court held that the pretermination proceedings violated plaintiff's property interest without due process. See Derstein v. Benson, 714 F. Supp. 481 (D. Kan.). Plaintiff was awarded damages for lost income, mental and emotional distress. In a post-trial order, the court granted plaintiff's request to be reinstated as a state employee for purposes of obtaining seniority for employee benefits. We must conclude that the plaintiff was not denied procedural due process and hence we reverse.

Leslie R. Derstein worked for nine and one-half years as a court services officer prior to his discharge. He had no written contract of employment. As a court services officer, Derstein could only be discharged by the administrative judges with approval of a majority of the other judges in the district. The terms of his employment were governed by the Kansas Court Personnel Handbook which provided that a tenured employee could be immediately terminated, without a hearing, for a "serious and grievous" offense. The term "sexual harassment" was not enumerated in the personnel rules as a "just cause" justifying immediate discharge. The parties agree that at the time of Derstein's discharge he was considered a "tenured" employee.

Numerous intra-office conflicts had surfaced, and the court administrator Steven Seyb was advised that an employee intended to contact an attorney about bringing charges against the state because of Derstein's alleged

sexual harassment. As a result Seyb asked the office of Judicial Administration to investigate the allegations. An investigation was conducted by Marjorie Van Buren, Personnel Officer of the Kansas Judicial Branch. She tape-recorded interviews with court employees and transcribed the tapes. The transcripts revealed numerous allegations made by different employees that Derstein had engaged in physical and verbal sexual harassment, over a period of years.

On May 6, Van Buren met with Seyb and defendant Judges Benson, Brazil and Jaworsky to review the transcripts of the taped interviews. At that time Judge Benson was a state administrative and district court judge while Judges Brazil and Jaworsky were state district court judges. The judges believed the incidents described in the transcripts amounted to sexual harassment, which in their opinion, constituted a "serious and grievous" offense justifying Derstein's immediate discharge. The same day Seyb wrote Derstein a memorandum requesting him

to meet in Judge Benson's chambers the next day. He was not informed of the purpose of this meeting. At the meeting Derstein was advised of Van buren's investigation regarding complaints of his "longstanding" problem of alleged verbal and physical sexual harassment and that an employee sought to bring a sexual harassment suit against the state. Judge Benson told Derstein he would have "ten days in which to resign or be terminated." At this point, Derstein denied any sexual harassment and inquired as to the factual basis for the claim. Derstein was advised that he could take appeal and would be given a hearing at that time. That same day, Derstein retained an attorney and later in the week he unsuccessfully attempted to obtain Van Buren's transcripts. Derstein's attorney made no such attempt at that time. It was not until after this lawsuit was filed (three years later) that he actually received a copy of the transcripts.

At the end of the ten days, Derstein received a termination letter that specified the nature of the charges against him and advised him of his right to appeal. The next day, counsel for Derstein appealed the decision. The appeal board denied Derstein's appeal finding it frivolous. Derstein then filed a "Motion for Hearing" which was also denied.

Derstein originally brought this section 1983 action against the State of Kansas, administrators, the judges on the appeal panel and Judges Benson, Brazil and Jaworsky. He voluntarily dismissed the state and the administrators prior to trial. The district court granted summary judgment in favor only of the judges who composed the appeal panel. However, the court denied the other defendants' motions raising qualified immunity as well as their contention that the plaintiff had no property interest in employment or, alternatively, that Derstein received due process for the deprivation of this interest.

After a full hearing on the merits, the court in granting judgment in favor of Derstein rejected for a second time defendants' claims which were raised in their prior motion. See Derstein, 714 F. Supp. at 491-94.

Defendants now appeal the district court's order granting judgment and damages in Derstein's favor. They attack the court's order on the following grounds: (1) that the district court erred in denying their claim for qualified immunity; (2) that Derstein had no protected property interest in employment and alternatively, that he received constitutional procedural due process; (3) that they are entitled to Eleventh Amendment immunity; (4) the court's damage award was not supported by substantial evidence. Further, they urge that it was error for the court to order the reinstatement of Derstein.

Derstein filed a cross-appeal urging that the trial court erred in finding he had no protected liberty interest. By reason of our

disposition of Derstein's procedural due process claim, we need not address defendants' remaining contentions of error.

Defendants challenge the district court's holding that Derstein had a property interest in his employment as a court services officer. As a public employee, he was entitled to procedural due process only if he was deprived of a property interest. See bd. of Regents v. Roth, 408 U.S. 564. We need not reach this issue, however, because even assuming that Derstein had a property interest in employment we conclude that he received procedural due process prior to termination.

The district court found that defendants' discharge of Derstein violated his due process right to a pretermination hearing defined under Roth or Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532. The court stated that it had "no hesitation in concluding that in this case Derstein received neither notice, nor an explanation of his employer's evidence, nor an

opportunity to be heard prior to his discharge." Derstein, 714 F. Supp. at 495. It found that prior to the May 6 meeting, Derstein was not advised of Van Buren's investigation, had "no facts which would indicate that [he] should have known that his termination was imminent," and had no opportunity to "tell his side of the story." Id.

The parties do not contest that Derstein was entitled to "some form of hearing" prior to discharge. See Roth, 408 U.S. 564. The more difficult questions of how much notice and opportunity are required were addressed by the Supreme Court in Loudermill. Under Loudermill the Supreme Court held that before a "tenured public employee" can be discharged, he "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's

interest in quickly removing an unsatisfactory employee." 470 U.S. at 546 (citations omitted).

Defendants urge that Derstein's pretermination hearing satisfied the due process requirements under Loudermill. We agree. This circuit has found no due process violation in similar circumstances. See Melton v. Oklahoma City, 879 F.2d 706 (10th Cir.), and Meder v. Oklahoma City, 869 F.2d 553 (10th Cir.).

In light of our decisions the record shows that Derstein received procedural due process prior to being deprived of his asserted property interest in employment. At the May 6 "pretermination hearing" Derstein was orally informed that defendants intended to discharge him because of complaints regarding a "long-standing" problem of his alleged verbal and physical sexual harassment. He was told of the investigation and of the name of an employee who threatened to bring a sexual harassment suit against the state due to his conduct. Further, Derstein was not terminated at the meeting but

given ten days to respond. This meeting provided Derstein all that was necessary under Loudermill - notice of the charges, the nature of the allegations and an opportunity to respond.

The fact that Derstein may not have known in advance about Van Buren's internal investigation, did not receive more facts or a copy of the transcript at the pretermination hearing is not significant. See Loudermill, 470 U.S. 532.

We also reject Derstein's argument that he was not given an opportunity to relate his side of the story. He was given ten days before termination. During this time he chose not to challenge the factual basis for the allegations. A pretermination hearing was never intended to be an adjudicative detailed proceeding.

Our inquiry does not end here. Since Loudermill rested in part on post-termination procedures, we must consider whether such procedures were available to Derstein. Counsel

for Derstein filed an appeal, pursuant to the Kansas Court Personnel Handbook based on two grounds. First, he argued that the defendants did not follow the procedures for discharge because Derstein had never received a written or oral reprimand for "sexual harassment." He also contested whether sexual harassment was a "serious and grievous offense" justifying immediate discharge because it was not listed as such in the personnel rules. The appeal board denied Derstein's appeal finding it frivolous. The board found that defendants followed the proper procedure in not issuing Derstein a reprimand prior to discharge. It also determined that sexual harassment could be considered a "serious and grievous" offense. Further, since Derstein did not challenge the factual allegation of sexual harassment, the board determined that no hearing was necessary.

Derstein then filed a "Motion for Hearing" requesting a full evidentiary hearing on the merits. In his motion, he stated that he filed

his initial appeal solely to initiate the administrative process. The appeal board unanimously denied this motion on the ground that Derstein, in his original appeal, challenged only the interpretation of rules and not the factual basis for his termination.

It is important to note that Derstein never contested, even after examining Van Buren's transcripts, the factual basis for his alleged sexual harassment. He did not argue that his conduct never occurred. Rather, Derstein is essentially challenging the legal issue of whether his conduct amounted to "sexual harassment" and if so, was it a "serious and grievous" offense justifying summary termination. Under these circumstances, we hold that the post-termination procedure provided to Derstein coupled with the pretermination opportunity to respond fully comports with Loudermill.

In his cross-appeal, Derstein asserts that he was denied a protected liberty interest. The

district court found that he had no protected liberty interest because he failed to show that his discharge was accompanied by public dissemination of information. We have stated that "[t]he concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, reputation, honor, and integrity, and 2) his freedom to take advantage of other employment opportunities." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir.). In order for a liberty interest to be implicated, Derstein must show that his dismissal "resulted in the publication of information which was false and stigmatizing." Rich v. Secretary of the Army, 735 F.2d 1220, 1227 (10th Cir.) (quoting Asbill v. Housing Authority of Choctow Nation, 726 F.2d 1499, 1503 (10th Cir.)) (footnotes omitted) (emphasis in original).

Derstein argues that the "publication" element was satisfied when he revealed the reasons for discharge in response to direct

questions by prospective employers. This argument directly conflicts with established precedent. See Rich, 735 F.2nd 1220. In Rich, we held that no liberty interest was impinged when the plaintiff himself publicized the circumstances of his discharge. "To impinge on a liberty interest, the stigmatizing information must be made public by the offending governmental entity." Id. at 1227. Derstein presented nothing to show that the allegedly stigmatizing evidence was made public by a governmental entity. Thus, the district court did not err in finding that Derstein has no claim that his interest in "good name, reputation, honor or integrity" was impaired.

However, the district court's judgment in favor of plaintiff is REVERSED and the case is REMANDED for the reasons hereinabove set forth as to the due process issues.

A20

No. 84-1219-K

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

LESLIE R. DERSTEIN

Plaintiff,

VS.

PAGE BENSON, J. PATRICK BRAZIL,

and JOHN JAWORSKY,

Defendants.

Filed May 22, 1989

MEMORANDUM AND ORDER

Plaintiff Leslie R. Derstein brought this action pursuant to 42 U.S.C. section 1983, claiming that the circumstances of his termination from his position as a state court services officer violated his right to due process. In particular, plaintiff claims that the three state district court judges who are the defendants in this action -- Judges Page

Benson, Patrick Brazil and John Jaworsky -- terminated him without warning due to allegations of sexual harassment.

Plaintiff alleges that he had a property interest in his continued employment entitling him to a pretermination hearing consisting of notice and opportunity to respond to the charges against him; that the circumstances of his termination deprived him of his "good name and reputation," thereby implicating his liberty interest and entitling him to a "name-clearing hearing"; that he did not receive a pretermination or name-clearing hearing, and if he had received such a hearing, he would not have been discharged. Finally, Derstein alleges he suffered damages in excess of $200,000.00 as a result of this denial of due process and his unjustified termination.

This case was tried to the court November 8-11, 1988, at which time the court took the matter under advisement. Both sides subsequently filed proposed findings of fact and

conclusions of law, and the parties were given the opportunity to make final oral argument on February 2, 1989. After reviewing the trial transcript and exhibits, as well as the extensive proposed findings submitted by the parties, the court is now prepared to rule.

Findings of Fact

Plaintiff Leslie Derstein began his employment with the Butler County District Court in December of 1971 as a juvenile probation officer. In October, 1973, Derstein was appointed Director of Butler County Court Services. In this position he exercised supervisory responsibilities over juvenile and misdemeanor probation officers as well as handling his own case load of juvenile offenders.

During his employment with court services, Derstein studied for and received a Masters Degree in Administration of Justice, with an emphasis in corrections. Beginning in 1974 and until his termination, Derstein taught first and

second level criminal justice classes at Butler County Junior College.

Plaintiff remained in his position as director of Butler County's court services until state-wide court unification. At that time court services officers became employees of the state. Derstein received notice on February 28, 1979 that his position was to be reclassified as a Court Services Officer II ("CSO-II"), a primarily supervisory position. As a CSO-II, plaintiff supervised juvenile, adult misdemeanor and adult felony probation officers. Within the Thirteenth Judicial District, Derstein was given the title of Assistant Director of Court Services for the District. In this position, plaintiff reported to Court Services Director Mike Schill and ultimately, to Judge Benson, the administrative judge for the district.

Following court unification, four court services officers ("CSO-I") were employed by the Thirteenth Judicial District. They were Sharon Neria, Kelly Monaghan, Mark Frey and Mary Van

Scyoc. Kelly Monaghan was subsequently replaced by Neil Harrison. Mary Wolfe was the secretary of the court services office.

As a state employee, the terms of plaintiff's employment were governed by the Kansas Court Personnel Handbook. According to the handbook, a tenured employee could not be summarily discharged except in the case of a "serious or grievous" offense. (Pl. Ex. 14, p. 21.) The parties agree that Derstein was considered a "tenured" employee and the disciplinary provisions of the handbook were applicable to him.

At some point after court unification, conflicts developed among staff members. In particular, disagreements arose between Derstein and adult probation officer Sharon Neria concerning office practices and procedures. For instance, Derstein proposed the creation of a central filing system, which Neria strongly opposed. Neria also objected to the juvenile probation officers' practice of taking Friday

afternoons off from work. Likewise, Derstein and Mark Frey objected to Neria's alleged practice of speaking to a client and then later laughing about the client's problems. Derstein and Frey went to Judge Benson to discuss these problems on several occasions, as did Sharon Neria.

In an evaluation dated July, 1980, Derstein received an overall rating of "very good" and was rated in the high range in most individual categories. In the category entitled "working relationships," however, Derstein was given an average rating and it was noted on his evaluation that "[Derstein] has been involved in friction producing situations with female members of staff. Usually related to supervising and giving direction to others. Direct and candid approach is taken as personal attacks on competencies and capabilities." (Pl. Ex. 39, pp. 46-50.) The evaluation further noted improvement in the area of personnel motivation and communication with staff but

suggested Derstein could benefit from behavior seminars regarding staff motivation and supervision.

In the fall of 1980, Judge Benson responded to the conflicts which had developed in the court services office by ordering that the two adult probation officers, Sharon Neria and Neil Harrison, report directly to him rather than to Director Schill or Derstein. Derstein continued to exercise intermediate authority over juvenile probation officer Mark Frey.

Judge Benson's attempt to resolve the office conflicts was unsuccessful, as the interoffice disputes continued and complaints were routinely brought to Judge Benson, particularly by Derstein and Neria. Mike Schill eventually resigned and Steve Seyb was appointed as "court administrator" for the Thirteenth Judicial District. As court administrator, Seyb was in charge of "the general operations of the district court" and thus had complete supervisory authority over the court services

office. (Tr., p. 449.) Judge Benson initially advised Seyb that he was to act as a "buffer" between Judge Benson and the court services officers. (Tr., P. 455.) Seyb thus informed all court services personnel that in the future they should bring their problems to him.

Seyb testified that after he became court administrator, his most frequent "visitors" were Sharon Neria and Les Derstein, and his conversations with the two of them became very repetitive regarding their concerns. In fact, Seyb viewed their separate visits as "tattletale" sessions because "[o]nce one found the other one had been up there, wasn't too much longer until the other one would be there." (Tr., p. 454.)

In April of 1981, Seyb determined that he could not individually supervise the court services employees and still accomplish his other job responsibilities, including supervising the activities of the clerk's office and the other three courts in the district.

Therefore, Seyb recommended to Judge Benson that since Derstein was the highest ranking CSO in the office, that he again be made supervisor in charge of all court services officers. Judge Benson agreed, and Derstein was reinstated as supervisor on a "probationary" basis -- e.g., at the end of 60 days, Seyb and Benson planned to review Derstein's progress. Seyb testified that if Derstein's supervisory position had not worked out, Seyb's options would have been to either extend the probationary period or demote Derstein to a CSO-I position. (Tr., p. 458.)

Seyb recalls that when the CSO staff was informed that Derstein would again be their supervisor, both Sharon Neria and the secretary, Mary Wolfe, reacted negatively. Neria merely voiced her displeasure with the action while Mary Wolfe advised Seyb she was going to quit because she did not want to work for Derstein. Wolfe subsequently did quit. (Tr., pp. 459-60.)

Derstein commenced his supervisory responsibilities on approximately April 15,

1981. Shortly thereafter, Seyb was advised that Sharon Neria intended to contact an attorney about bringing a sexual harassment suit against the state because of Derstein's alleged sexual harassment of Neria.[1] Seyb decided that the best way to handle this "rumor" was to contact the office of Judicial Administration in Topeka and seek their assistance in conducting an investigation.

Seyb thus contacted Marjorie Van Buren, personnel officer for the judicial administrator's office. Prior to conducting the investigation requested by Seyb, Van Buren had conducted one other investigation of sexual harassment in the court system. She was also familiar with the EEOC guidelines on sexual harassment.

After Seyb informed Van Buren of the rumor regarding Neria's intent to file a sexual harassment suit and of the need for an

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[1] Seyb testified that he could not recall who advised him that Neria was considering bringing a sexual harassment suit. (Tr., p. 460.)

investigation, Van Buren sent Seyb some "materials" on sexual harassment. Specifically, Seyb received from Van Buren an article on sexual harassment from an issue of "Redbook" magazine and two pages copied from a Commerce Clearing House publication on sexual harassment. These materials were subsequently placed in the "Derstein investigation file." (Tr., p. 480.)

Van Buren made two trips to El Dorado to investigate the allegations of sexual harassment. During her first visit on April 22-23, 1981, Van Buren interviewed Sharon Neria and from Neria received the names of several other persons to talk with, including Neil Harrison. In addition to Neria and Harrison, Van Buren talked to Kelly Monaghan, Mary Van Scyoc, Mary Wolfe, and Nancy Brush, a courthouse employee. Van Buren made no attempt to interview Derstein, Mary Frey or Derstein's former supervisor, Mike Schill, during these initial or subsequent interviews.

On her second trip to El Dorado on April 29, 1981, Van Buren tape-recorded interviews with some of the individuals she had spoken with on her first trip. While the interviews were not conducted under oath, the taped interviews were transcribed and copies of the transcribed interviews were introduced at trial.[2] The various individuals interviewed related a number of complaints to Van Buren. Kelley Monaghan stated that Derstein got along well with male employees in the court services office, but not with female employees. She stated that Derstein would put his arm around the women in the office or try to tickle them and sometimes he would pop their bra straps or make paper wads and try to throw them down their blouses. Monaghan also stated that Derstein would sometimes make offensive remarks to her about her attire, which made Monaghan feel uncomfortable. (Def. Ex. N.)

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[2] While the court recognized that the transcribed interviews were hearsay if offered to prove the truth of the matter asserted, the court admitted them in order to be apprised as to the content of each witness' complaint.

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Neil Harrison related to Van Buren that while he could not recall "anything of major significance on sexual harassment," he did recall Derstein commenting to him in front of a female social worker that Mary Wolfe, the office secretary, had a "fine ass." (Def. Ex. M.)

Nancy Brush told Van Buren that Derstein had "a habit of wanting to touch" but never made any "bad comments" to her. Brush stated that "once or twice I asked him [Derstein] not to put his hands on me ... and then he would just kind of laugh like he took it as a joke." (Def. Ex. O.)

Van Buren questioned Mary Wolfe regarding why she was leaving her job as secretary and Wolfe responded that she could no longer work for "a man [Derstein] that I don't have any respect for, someone who makes me feel uncomfortable, expects things like coming in on time when he can't do it himself." Wolfe recalled that on one occasion when she had returned to the office from an errand and

commented on the cold weather Derstein told her, "'[i]t's not cold outside, you're just frigid.'" Wolfe also stated that Derstein made her feel uncomfortable and self conscious about how she dressed, and because of this uneasiness she quit wearing sweaters to the office. (Def. Ex. K.)

Sharon Neria told Van Buren that Derstein had made "some sexual comments" to her in the past. She related one particular incident which occurred when court services staff members had just finished putting a new file cabinet together and an attorney walked in and asked what they were doing. Derstein responded "'Oh, I was just screwing Sharon.'" Neria also discussed with Van Buren numerous other difficulties she had with Derstein's office practices, which, for the most part, did not relate to her claims of sexual harassment. (Def. Ex. L.)

On May 6, 1981, Van Buren met with Steve Seyb, Judge Benson, Judge Brazil and Judge Jaworsky, and provided them with transcripts of

the taped interviews. At the meeting, Van Buren stated her conclusion that Derstein's conduct, as described by the individuals she interviewed, constituted sexual harassment. Van Buren further stated her opinion that under the Kansas Court Personnel Rules, "sexual harassment" constituted a "serious and grievous offense" for which Derstein could be immediately terminated.

After lengthy discussion, the decision was made to terminate Derstein's employment under the provision of the personnel rules justifying immediate termination based upon commission of a "serious and grievous offense."

That section provides:

> An employee may be discharged immediately in a case in which a serious or grievous offense has occurred . . .
>
> Just causes for immediate discharge are:
>
> 1. The employee has been convicted of a crime involving moral turpitude.

2. The employee had willfully, wantonly, unreasonably, unnecessarily, or through culpable negligence been guilty of brutality or cruelty to a resident of an institution, to a person in custody, or to other personnel, provided the act was not necessarily or lawfully done in self-defense, to protect the lives of others, or to prevent the escape of a person lawfully in custody.

3. The employee has been intoxicated or under the influence of illegal drugs while on duty.

4. The employee has taken for his or her personal use from any person any fee, gift, service, or other valuable thing in the course of his or her work or in connection with it when such person is in expectation of

receiving a favor or better treatment than the accorded other persons.

5. The employee has diverted or converted money or property belonging to or in the custody of the court.

An employee may be suspended without pay pending investigation of an allegation of a serious or grievous offense.

(Pl. Ex. 14, p. 25)

After the decision was made to terminate Derstein, Seyb wrote Derstein a memo, dated May 6, 1981, which stated: "The Judge has requested that you and I meet with him, in chambers tomorrow, 5-7-81 at 8:30 a.m. See you then." (Pl. Ex. 39, p. 14.) The memo did not state who would attend the meeting or its purpose. Derstein testified at trial that he believed that the meeting was to be between Seyb, Judge benson and himself and had been called in response to an earlier request made by Derstein for a meeting between Seyb, Judge

Benson and Derstein. Seyb's testimony confirmed that Derstein had requested a meeting with Seyb and Benson to discuss his new role as supervisor. Seyb testified, however, that it never occurred to him that Derstein would think that the May 7, 1981, meeting with Judge Benson was to be the meeting Derstein requested.

When Derstein arrived at the scheduled meeting in Judge Benson's chambers, he found Benson, Judge Brazil, Judge Jaworsky and Steve Seyb already present. Judge Benson began the meeting by reviewing the history of the court services office and various internal problems in the office. He noted that two or three years before, the county commissioners had recommended that Derstein be terminated, but Judge Benson had decided not to do so. Judge Benson informed Dertstein that a court services employee had threatened to seek counsel and bring a sexual harassment suit against the state, and as a result, an investigation had been conducted which revealed that Derstein had been involved

in verbal and physical sexual harassment over a period of years. Judge Benson then informed Derstein that he had ten days in which to resign or be terminated.

Derstein asked who had made this claim against him and what Judge Benson meant by "sexual" or "verbal" harassment. Judge Benson told him only that Sharon Neria had made the claim. Seyb responded that Derstein had been involved in "unprofessional behavior." Derstein then asked Seyb, "What do you mean, unprofessional behavior?" (Tr., p. 128)

When Derstein's questions were met with silence, Derstein spoke briefly about the education he had obtained, how he sincerely cared about the court services office, and about the problems he had experienced in the office. He then told the judges that "there was something fishy going on" and that he "evidently had been framed." He concluded by telling the judges that they had been getting a lot of lies, and "if that is what it takes to get something,

then I guess I will have to start lying." (Tr., p. 129) Judge Brazil advised Derstein that he would have ten days to appeal the termination decision and would be given a hearing at that time. (Tr., p. 131.) Judge Benson then asked if there was anything else Derstein wanted to say and Derstein replied "no."

The entire meeting lasted approximately 15 minutes. In his testimony at trial, Seyb confirmed that when the decision was made to terminate Derstein and to call him in to Judge Benson's office to inform him of that decision, no one intended or planned to get Derstein's side of the story. Moreover, in his trial testimony Seyb confirmed his previous deposition testimony that "there wasn't anything that went on on May 7, 1981 in the judge's chambers that amounted to a hearing." (Tr., p.508.) Judge Brazil recalled at trial that Derstein asked a number of questions at the meeting and that no response was given to several of those questions. (Tr., p. 603.)

After the meeting, Derstein returned to work. Initially, he went to Mark Frey's office to talk with him about what had happened. He then returned to his office where he spent some time "getting [himself] together" and "figuring out if this [the termination] was real or not." (Tr., p. 133.) Derstein still wanted to know what the allegations were against him, so later that same morning, he attempted to obtain a copy of Van Buren's investigation transcript. He asked Judge Benson for a copy and was told by Judge Benson that he did not have a copy and referred Derstein to Van Buren. Consequently, Derstein contacted Van Buren, who informed him that Judge Benson did have a copy of the transcript and that it was all right for Benson to give it to Derstein. Derstein again approached Judge Benson, who repeated his claim that he did not have a copy of the transcript. (Tr., pp. 133-134.)

Later that same day, Derstein contacted attorney Gene White and retained White to

represent him. During this initial meeting, Derstein advised White that he had never sexually harassed any of the women in the courthouse. Also during this meeting, White and Derstein reviewed the Kansas Court Personnel Handbook and White concluded that even if Derstein was guilty of sexual harassment, it could not be considered a "serious and grievous" offense. White subsequently spoke with Judge Benson and told Benson that "you may be able to fire Les [Derstein] for several reasons but you can't fire him for this reason, and you're doing it the wrong way." (Tr., p. 284) White did not attempt, however, to obtain a copy of the investigation transcripts from Benson because "he [Benson] was going to follow a course of conduct that he had decided was appropriate, and I felt my role at that time was just to wait and see what he did and then to take appropriate steps on [Derstein's] behalf in response to that." (Tr., p. 285)

Derstein did not take up the judges' offer that he "resign," rather than be terminated, but instead remained at his job until May 17, 1981. On that date, Judge Benson personally delivered Derstein's termination letter, effective the same day. The letter stated that Derstein's discharge was the result of information "made available" which indicated "an identifiable pattern of sexual harassment of female employees of the Unified Court System over an extended period, which constitutes a grievous offense." (Pl. Ex. 39, p. 11.) The letter further informed Derstein that "[t]he statements of a number of persons allege you have constantly made physical and verbal gestures [sic] restricted to female co-workers and employees" and that such behavior is "totally unacceptable." Id. Finally, the letter advised Derstein of his right to appeal the decision within ten days of the date of termination.

On May 18, 1981, Gene White filed an appeal letter on behalf of Derstein to the Judicial

Administrator's Office. The letter stated in relevant part:

> The basis for the appeal is that in the 9 1/2 years Mr. Derstein worked for the court services he has never received either an oral or written reprimand for "sexual harassment." That the enumerated "just causes for immediate discharge" are inclusive in nature and the "sexual harassment over an extended period" is not one of the enumerated just causes.

(Pl. Ex. 39, p. 9) (emphasis in original)

Judges Benson, Brazil and Jaworsky responded to Derstein's appeal letter by filing their own letter with the appeal board [3] The letter, dated May 26, 1981, discusses none of the specifics of the sexual harassment allegations but instead recounts past internal office disputes, unrelated to the charges of

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[3] The appeal board consisted of a judge (Herbert Walton), a supervisory employee (Kay Falley), and a non-supervisory employee (Jess Danner).

sexual harassment. (See discussions, infra, at pp. 39-40.)

On June 25, 1981, the appeal board, in a 2-1 decision, found Derstein's appeal to be "frivolous" because Derstein only raised the legal issue of whether sexual harassment was a serious and grievous offense. Because the board found that Derstein had not challenged the factual allegations of sexual harassment, it determined no hearing was justified. Derstein subsequently filed a motion requesting that the appeal board set aside its order finding the appeal frivolous and grant him a full hearing on the merits. In the motion, Derstein stated that his appeal letter was intended to generally initiate the appeal process, and that he was unable to go beyond generalities in his appeal letter because he had been denied access to the factual basis for his charge. The appeal board also denied this motion.

While the decision of the appeal board was appealable to the state district court pursuant

to K.S.A. 60-210(d), plaintiff did not appeal the decision but unstead chose to pursue a remedy in this court pursuant to 42 U.S.C. § 1983.

Derstein testified that he was unable to obtain employment for approximately four months following his termination. During that time period he applied for numerous jobs and had several interviews. He testified that he was willing to take any job which allowed him to keep his house and "keep on going" (Tr., p. 154.)

During some of the interviews, Derstein recalls being asked questions regarding the basis for his termination from court services. Derstein responded to these questions by telling the truth, i.e., that he was fired because his employers believed he was sexually harassing female employees. Derstein anticipated that this question would come up in every interview he obtained, and when the question was asked, it made him very uncomfortable. (Tr., p. 156.)

In October, 1981, Derstein obtained employment as an assistant manager with Wendy's of Wichita. Derstein commuted to and from his job at Wendy's in Wichita to his home in El Dorado six days a week. Because of his hours and work schedule, Derstein was unable to continue teaching classes at Butler County Community College. Wendy's did not have family health insurance and it was thus necessary for Derstein to carry a separate Blue Cross and Blue Shield policy for his family.

Motivated by the prospect of obtaining family health insurance and better working hours, Derstein left Wendy's in October, 1982 to work as an assistant manager for the Hardee's outlet at the Towanda service area on the Kansas Turnpike. He again commuted to and from his home and job, a distance of approximately 25 miles, six days a week. In July, 1984 Derstein returned to work at Wendy's, where he was employed until January , 1985.

In January, 1985, Derstein was hired as a Corrections Officer I with the kansas State Industrial Reformatory in Hutchinson. He was promoted to a Corrections Counselor I after approximately one month. In November, 1985, Derstein obtained the position he currently holds as a Correction Counselor II at the El Dorado Honor Camp.

On April 17, 1984, Derstein brought this action pursuant to 42 U.S.C. § 1983, claiming the circumstances of his termination from his position as a court services officer violated his right to due process. Specifically, plaintiff claims that he had a property interest in his continued employment, entitling him to a pretermination hearing, consisting of notice and an opportunity to respond to charges against him; that the circumstances of his termination deprived him of his "good name and reputation," thereby implicating his liberty interest and entitling him to a "name-clearing hearing"; that he did not receive a pretermination or

name-clearing hearing, resulting in a denial of his due process rights; and as a result of that denial and his unjustified termination, he suffered actual damages in excess of $250,000.00.

Plaintiff originally brought this action against the State of Kansas, Judges Benson, Brazil and Jaworsky, Steven Seyb, Marjorie Van Buren, and the three individuals who composed the administrative appeal board, Jess Danner, Kay Falley and Herbert Walton.[4]

Early on, the plaintiff stipulated to the dismissal of all claims against the State of Kansas after agreeing that the state is immune from suit under the Eleventh Amendment. The court previously granted summary judgment in favor of defendants Danner, Falley and Walton on the ground these defendants were entitled to absolute judicial immunity. See Derstein v. The

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[4] This case was delayed for some time when defendants appealed the district court's ruling that Kansas' three year statute of limitation for actions arising out of a contract applied to Derstein's action. The Court of Appeals eventually affirmed the ruling. Derstein v. Van Buren, 823, F.2d 653 (10th Cir. 1987).

State of Kansas, et al., No. 84-1219-K, slip op. at 18 (D. Kan. Apr. 28, 1988). Defendants Marjorie Van Buren and Steven Seyb were voluntarily dismissed by plaintiff at trial. Accordingly, the only defendants remaining at trial were Judges Benson, Brazil and Jaworsky.

Additional facts will be discussed where relevant.

Conclusions of Law

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569, (1972); Spikes v. United States, 744 F.2d 1418, 1420 (10th Cir. 1984). Accordingly, before the court can reach the issue of whether Derstein was afforded due process, it must first consider whether, under the facts presented here, plaintiff had a protected property or liberty interest.

A. Property Interest

A protected property interest in a particular benefit exists only if one has a legitimate claim on entitlement to it. Board of Regents v. Roth, 408 U.S. at 567. Property interests are not created by the Constitution, but arise from independent sources such as state statutes, local ordinances, established rules, or mutually explicit understandings. Perry v. Sindermann, 408 U.S. 593, 601 (1972); Richardson v. City of Albuquerque, 857 F.2d 727, 731 (10th Cir. 1988). The sufficiency of such a claim of entitlement is determined by reference to state law. Bishop v. Wood, 426 U.S. 341, 344 (1976). Hence, in this case, the court must determine whether plaintiff has a "legitimate claim of entitlement" to his employment under Kansas law.

While it is uncontroverted that Derstein did not have a written employment contract, Derstein contends he had an implied-in-fact employment contract. A property interest in

employment can be created by such a contract. Bishop v. Wood, 426 U.S. at 344.

Kansas follows the general rule that in the absence of a contract between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party. Johnson v. National Beef Packing Co., 220 Kan. 52, 54-55, 5 51 P.2d 779 (1976); Swart v. Huston, 154 Kan. 182, 117 P.2d 576 (1941). An exception to the employment-at-will doctrine had been recognized, however, where the plaintiff can show the existence of an implied contract. Morriss v. Coleman., Co., Inc., 241 Kan. 501, 513-14, 738 P.2d 841 (1987).

In a memorandum and order dated April 28, 1988, in which the court took up defendants' summary judgment motions, the court thoroughly considered and analyzed Kansas case law leading up to the Morriss decision and concluded that the determination of whether an implied-in-fact employment contract exists involves a factual inquiry which must be determined from all of the

evidence presented on that issue by the parties. Derstein v. State of Kansas, et al., slip op. at 8. The court noted that the Morriss court, in ascertaining what factors should be considered in this inquiry, drew in part from an earlier Court of Appeals decision, Allegi v. Providence-St. Margaret Health Center, 9, Kan.App.2d 659, 664, 684 P.2d 1031 (1984), which stated:

> It is well recognized that parties may become contractually obligated by their nonverbal conduct as well as by their use of oral or written words... Although such an agreement cannot be established solely by an employee's subjective understanding or expectation as to his employment, a mutual intent to employ plaintiff as long as he did his job satisfactorily could be based upon such factors as the longevity of plaintiff's employment with defendant... the

> nature of plaintiff's employment,...than the excellent performance evaluations plaintiff received from defendant.

(Citations omitted.)

In its previous decision, the court also considered defendants' contention that they were entitled to qualified immunity because Kansas law recognizing the existence of implied contracts was not established until the Kansas Supreme Court's 1987 decision in Morriss v. Coleman, while Derstein's termination occurred in 1981. The court held:

> This argument is without merit. As previously discussed. [Johnson v. National Beef Packing Co.] clearly recognized that implied employment contracts are an exception to at-will employment, and that the existence of such a contract depends upon the circumstances of the employment relationship. Morriss merely

> clarified that such a determination is not appropriate at the summary judgment stage if facts are present which evidence an implied contract.

Derstein v. State of Kansas, et al., slip op. at 14

Despite the court's previous ruling, defendants have renewed their intention that they are entitled to qualified immunity, and they now urge the court to adopt the approach recently taken by Chief Judge O'Connor of this district in Staneart v. Board of Trustees of Ransom Memorial Hosp., 684 F.Supp. 1573 (D. Kan. 1988).

In Staneart, plaintiff was terminated from her position as the director of nursing of a county-owned hospital. She then brought a § 1983 action against the hospital, asserting that she had a property interest by way of an implied contract of employment. Defendants moved to dismiss on the ground they were entitled to qualified immunity because the law

in Kansas was not clearly established at the time of plaintiff's termination.

Judge O'Connor agreed, reasoning as follows:

> In sum, the legal background against which Staneart's termination was made included a Kansas Supreme Court case [Johnson v. National Beef Packing Co.] which held that an employment manual distributed during an employees's tenure could not create an employment contract. It also included a kansas Court of Appeals case [Allegri v Providence-St. Margaret Health Center] which held that an employment manual, as well as positive performance evaluations, could be considered in determining whether an implied employment contract existed. A federal court has also interpreted Kansas law to recognize the relevance

> of an employment manual in determining whether an implied contract existed [Rouse v. People's Natural Gas Co., 605 F.Supp. 230 (D.Kan. 19850].
>
> Given this background, we find that the law in Kansas was not clearly established at the tim of Staneart's termination as to the circumstances giving rise to an implied contract.

684 F.Supp. at 1577.

In reaching this decision, Judge O'Connor focused on the Kansas court's determination in Johnson that an employment manual distributed during an employee's tenure which contained a "just cause" clearly recognizes that an implied employment contract may be an exception to the employment-at-will rule, and that the existence of such a contract depends upon the factual circumstances of each particular case. The court held in Johnson:

> Where no definite term of employment is expressed, the duration of employment depends on the intention of the parties **as determined by circumstances in each particular case.** The understanding and intent of the parties is to be ascertained from the written or oral negotiations, the usages of business, the situation and object of the parties, the nature of the employment, and all the circumstances surrounding the transaction. . . .

Johnson, 220 Kan. at 54-55 (quoting 53 Am.Jur.2d, Master and Servant § 27, p. 103) (emphasis added).

This language was cited with approval by the Kansas Court of Appeals in Allegri, 9 Kan.App.2d at 6663, and by the Kansas Supreme Court in Morriss, 241 Kan.App.2d at 663, and by the Kansas Supreme Court in Morriss, 241 Kan. at 510. Accordingly, this court reaffirms its

previous decision that at the time of defendant's termination, Kansas clearly recognized an implied contract as an exception to the general rule of employment-at-will.

Defendants argue, however, that even if the court holds that kansas law recognized implied contracts in 1981, defendants are still entitled to qualified immunity because the question of whether an implied contract exists is a question of fact to be determined by the fact finder. Defendants reason that where the existence of a property interest depends upon the facts of a particular case, no property right can be "clearly established." Defendants again rely upon Staneart v. Board of Trustees, 684 F.Supp at 1573, where Judge O'Conner held that even if clearly established, the law regarding implied contracts requires a determination by a fact finder that an employment contract exists. Judge O'Connor concluded that where a factual issue must be resolved to determine whether the plaintiff has a property interest in his

continued employment, then the plaintiff does not have a "clearly established right to employment of which the defendants should reasonably have known." 684 F.Supp at 1578. Accordingly, Judge O'Connor found the defendant in Staneart to be qualifiedly immune.

The court declines to adopt this analysis. Under the reasoning of Staneart, a plaintiff who claims to have an implied contract of employment could never establish the existence of a property interest in his or her continued employment since that questions is one which must necessarily be resolved by a fact finder.

Pursuant to Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), public officials performing discretionary functions are shielded from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under this test, the defendants may be liable if a reasonable person would have known that Derstein

had a property interest in his continued employment, and deprived him of that right without affording him due process.

The court has already determined that implied employment contracts were recognized in Kansas in 1981. Thus, a reasonable person would have been required to consider the circumstances of plaintiff's employment to determine whether an implied contract existed. While the determination would depend upon the factual circumstances of that case, the court cannot agree that the defendants can be absolved from liability for their decision simply because they were required to make some minimal evaluation of plaintiff's individual circumstance. Accordingly, the court concludes that the Kansas law recognizing implied employment contracts was clearly established in 1981, and defendants are not entitled to qualified immunity in this case.

The only question remaining is whether, under the facts presented at trial, Derstein established the existence of an implied employment contract and thus a property interest in his continued employment.

The court concludes that Derstein did have an implied contract of employment and his expectation of continuing employment pursuant to this implied contract gives him a property interest of which he cannot be deprived without due process. The facts supporting the court's finding include the existence of a personnel handbook which sets forth the terms and policies of employment, including that immediate discharge is allowed only for "grievous offenses;" plaintiff's tenured status according to the manual; the excellent evaluation he received less than a year before his termination; the longevity of his employment with the court system (9-1/2 years); and the advanced education and degree he obtained in

administration of justice while he was employed with the state.

Because Derstein had a protected property interest in his continued employment, the requirements of due process apply.

B. Liberty Interest

Before the court considers whether or not Derstein was afforded due process in this case, it will first determine whether the circumstances of his termination implicated plaintiff's liberty interest.

The liberty concept recognizes two particular interests of a public employee: (1) a protection of his good name, reputation, honor and integrity; and (2) freedom to take advantage of other employment opportunities. Conway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988); Miller v. City of Mission, Kan., 705 F.2d 368, 373 (10th Cir. 1983). The Tenth Circuit recently summarized the circumstances which implicate a public employee's liberty interest, entitling the employee to a hearing:

> When termination "is accompanied by **public dissemination** of the reasons for dismissal, and those reasons would **stigmatize the employees reputation or foreclose future employment opportunities**, due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal."

Meder v. City of Oklahoma City, 869 F.2d 553, 554 (10th Cir. 1989) (quoting Miller v. City of Mission, Kan, 705 F.2d at 373) (emphasis added).

There can be little doubt in this case that the reasons given for plaintiff's discharge, i.e., that he sexually harassed females in the office--were "stigmatizing." Moreover, this court held in its previous opinion that the "publication" element necessary to establish a liberty interest was satisfied by the plaintiff's "voluntary" revelation of the reasons for his termination to a potential

employer. Derstein v. State of Kansas, et al., No. 84-1219-K, slip op. at 11 (D. Kan. Apr. 23, 1988) (following Polson v. Davis, 635 F.Supp. 1130, 1142 (D. Kan 1986)).

Defendants now urge the court to reconsider its previous determination that plaintiff has alleged facts sufficient to support the "publication" or "public dissemination" element. The court agrees that reconsideration of this issue in order.

In its previous opinion, the court overlooked the Tenth Circuit's decision in Rich v. Secretary of the Army, 735 F.2d 1220, 1227 (10th Cir. 1984), wherein the court held that no liberty interest was implicated when the plaintiff himself publicized the circumstances of his discharge. The Court specifically stated: "To impinge on a liberty interest, the stigmatizing information must be made public by the offending governmental entity." Id. See also Downum v. City of Wichita, Kan., 675 F.Supp. 1566, 1572 (D. Kan. 1986) (no liberty interest

implicated where plaintiff, and not defendants, initiated the publication of information concerning plaintiff's transfer).

In light of this controlling authority, the court is required to hold that plaintiff's "voluntary" revelation of the reasons for his discharge to potential employers did not constitute the type of "publication" required to implicate plaintiff's liberty interest.

Since plaintiff failed to present any evidence at trial which would indicate that the defendants disseminated information regarding the reasons for plaintiff's discharge to the public, the court must find that under the circumstances of this case, plaintiff's discharge did not implicate a liberty interest.

C. Requirements of Due Process

Although the court has found no implication of plaintiff's liberty interest, the existence of a property interest requires the court to consider whether plaintiff was afforded due process in this case.

The type and degree of procedural protection necessary in order to comply with due process requirements is a question of federal constitutional law. The Supreme Court has held that the essential requirements of due process are notice and an opportunity to respond. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). Further, where protected interests are implicated, the right to "some kind of hearing" **prior** to dismissal is paramount. Board of Regents v. Roth, 408 U.S. at 569-70.

Thus, plaintiff was entitled to a hearing prior to his discharge. While this hearing need not have been elaborate, plaintiff was entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Loudermill, 470 U.S. at 545.

The court has no hesitation in concluding that in this case Derstein received neither notice, nor an explanation of his employer's

evidence, nor an opportunity to be heard prior to his discharge.

Derstein was not advised by the defendant that an investigation was being conducted or of the basis for the investigation. Nor was he told of Van Buren's conclusions or of the fact that she reported her conclusions to the judges. Rather, Derstein was simply advised on May 6, 1981 to appear in Judge Benson's chambers at 8:30 the following morning. Derstein had no idea what the subject of that meeting would be; in fact, he understandably believed that it was called in response to a request he had made for a meeting between himself, Seyb and Judge Benson.

Although the facts indicate that there had been personality conflicts and problems in the office for some period of time, there are not facts which would indicate that Derstein should have known that his termination was imminent. Approximately nine months before his discharge, Derstein received an overall evaluation of

"excellent." While the evaluation indicated that Derstein was involved in "friction producing situations with female members of the staff," it did not indicate in any way that this friction related to sexual harassment, or that the failure to resolve the conflicts might lead to his termination. The evaluation further noted improvement in the areas of personnel motivation and communication with staff and advised Derstein to attend seminars on staff motivation and supervision. Moreover, just two weeks before his termination, Derstein had been placed in a supervisory position on a probationary basis, indicating the judges had at least some confidence in Derstein's ability.

At the meeting in which he was discharged, Derstein was advised that Marjorie Van Buren had completed an investigation, that the investigation revealed a "long-standing" problem of physical and verbal sexual harassment, and that Derstein had ten days in which to either resign or be terminated. Derstein was not given

the opportunity to tell "his side of the story," nor could he have adequately responded if he had been given the opportunity, since he was never advised of the charges against him. Nevertheless, Derstein denied that he had ever sexually harassed any of his co-workers and asked those present what he had done. His questions were met with silence and he was advised only that he had acted "unprofessionally" and that he would have an opportunity to appeal the decision. Further, it is significant that Steve Seyb, Derstein's immediate supervisor, testified that the meeting in which Derstein was advised of his discharge did not constitute a "hearing," nor was it ever intended or planned to be a hearing.

The court cannot expand the concepts of "notice" and "opportunity to be heard" to encompass the circumstances of this case. Plaintiff did not receive anything even resembling a pretermination hearing, and thus

the court concludes he was not afforded due process.

Defendants urge the court to find that even if plaintiff was not given a pretermination hearing, defendant cannot be held liable because the right to pretermination hearing was not clearly established until the Supreme Court 's 1985 decision in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, and therefore defendants are qualifiedly immune. The court fully addressed this issue in its previous memorandum and noted that the right to a pretermination hearing was initially established by the Supreme Court in 1972 in Board of Regents v. Roth, 408 U.S. 564. Derstein v. State of Kansas slip op. at 15. In Roth, the Court held that "[w]hen protected interests are implicated, **the right to some kind of prior hearing** is paramount." 408 u.s. at 569-70 (emphasis added).

The court reaffirms its previous holding here and finds that the right to a hearing prior

to the deprivation of a property interest was clearly established right at the time of Derstein's termination in 1981. Accordingly, defendant's are not entitled to qualified immunity for their actions in denying plaintiff due process.

Defendants next argue that plaintiff was not denied due process because he "waived" that right when he failed to properly perfect his appeal to the appeal panel. In support of this contention, defendants cite a number of cases wherein courts have held that if a plaintiff is "offered" adequate safeguards but "declines" to take advantage of them, the plaintiff has waived his due process rights. See, e.g., Suckie v. Madison General Hospital, 499 F.2d 1364, 1367 (7th Cir. 1974); Al Charles, Inc. v. Heintz 620 F. Supp. 327, 331032 (D. Conn. 1985).

The Tenth Circuit recently reiterated that a strong presumption is to be applied against the waiver of constitutional rights. Pitts v. Board of Educ. of U.S.D. 305, 869 F.2d 555, 557

(10th Cir. 1989). Nevertheless, the court held that due process rights may be waived if the waiver is "'done in an informed manner.'" Id. (quoting Johnson v. United States Dept. of Agriculture, 734 F.2d 774, 784 (11th Cir. 1984)). In Pitts, a tenured teacher who had received notice of the board's decision to terminate him initially indicated his desire for a pretermination hearing as provided by statute. He subsequently filed a lawsuit, however, and indicated by letter his intent to waive his right to a pretermination hearing. In finding that Pitts had waived his right to due process, the court made clear that it was not holding that plaintiff was required to exhaust his claim before he had a federal cause of action; rather, the court reasoned that where state law afforded him adequate due process, plaintiff had no constitutional claim to begin with. Id.

This instant case is distinguishable from Pitts and from the cases cited by defendants in two important respects. First, plaintiff was

never "offered" an adequate pretermination hearing. Second, plaintiff clearly did not "decline" or waive his right to a pretermination hearing. Nor did he decline to appeal the termination decision to the appeal board. Rather, he filed an appeal in which he intended to challenge the factual basis for his termination but which the appeal board decided was frivolous because it only challenged the judges' finding regarding the classification of "sexual harassment" as a grievous offense.

Even if the court were to conclude that by failing to properly perfect his appeal, plaintiff "waived" his right to a hearing before the appeal board, plaintiff would not have waived his right to a "pretermination" hearing because the grievance procedures provided by the state constituted post-termination procedures.

In making this determination, the court is guided by the recent Tenth Circuit decision in Seibert v. State of Okl., ex rel. University of Oklahoma Health Sciences Center, 867 F.2d 591

(10th Cir. 1989). In Seibert, a discharged university employee brought a civil rights action claiming, inter alia, that he was entitled to a pretermination hearing under the due process clause because he had a property interest in his continued employment. The district court directed a verdict in favor of defendants based on its finding that plaintiff, by refusing to initiate the grievance procedures outlined in the university's policy manuals, waived any right to a pretermination hearing. The Tenth Circuit disagreed, holding that "the grievance rules effectively were post-termination procedures."[5] 867 F.2nd at 596.

The "grievance rules" at issue in Seibert provided that a termination was not "final" until ten working days after the university gave the employee notice of termination. Further,

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[5] Notwithstanding this conclusion, the Tenth Circuit affirmed the district court's holding after finding "more than sufficient evidence in the record to establish that the pre-termination procedures which the University accorded plaintiff fully satisfied plaintiff's constitutional right to notice and an opportunity to be heard before discharge." 867 F.2d at 598.

the rules provided that an employee could begin grievance procedures any time during the 10-day period, and if the employee initiated grievance procedures, the termination was suspended temporarily. 867 F.2d at 597.

When compared to the facts in Seibert, the circumstances here provide an even clearer basis for holding that the procedures provided by the state were post-termination rather than pretermination procedures. Here, the personnel handbook provided for "appeal procedures" for an employee who is dissatisfied with a disciplinary action. The handbook stated that the appeal must be filed within ten calendar days after the action being appealed, but the filing of an appeal would not affect the operation of the action from which the appeal is taken. (Pl. Ex. 14) Thus, although Derstein was told in the meeting with the judges that he had ten days in which to resign or be terminated, he had no right to appeal the termination decision until he received his letter of termination ten days

later. Moreover, his subsequent appeal did not affect the operation of the termination decision.

Defendants argue that because plaintiff continued to work for ten days and was paid during that time period, his termination was not final and he had "opportunities to gain further explanation and give further responses at the pretermination level." (Defendants' Proposed Findings of Fact & Conclusions of Law, p. 45.) Neither the facts nor the handbook provisions support defendants' assertions.

On the same day of his termination, Derstein attempted in vain to discover the facts underlying his termination. He requested a copy of the investigation transcript from Judge Benson, who claimed that he did not have a copy of the transcript and referred Derstein to Steve Seyb. Seyb also claimed he did not have the transcript and suggested Derstein talk with Marjorie Van Buren. When Derstein phoned Van Buren in Topeka, Van Buren told him that Judge

Benson did have a copy of the investigation transcript and that he could show it to Derstein. When Derstein again requested the transcript from Judge Benson, he was again advised that Benson did not have a copy.

Thus, it is clear that none of the parties involved had any intention of providing Derstein with a copy of the investigation transcript or an explanation of the charges for which he was terminated. Even if Derstein or his attorney had been successful in obtaining the transcript prior to his termination, it is clear that defendants did not intend to provide him a hearing prior to his termination, although they did expect him to take advantage of the post-termination appeal procedures.

The court concludes that the appeal procedures provided by the handbook constitute post-termination procedures and were not a substitute for the pretermination hearing to which plaintiff was entitled. Thus, Derstein's failure to properly perfect his appeal did not

constitute a waiver of his due process rights. Since Derstein did not receive even minimal due process in the form of notice and an opportunity to be heard prior to his termination, the court concludes plaintiff was not afforded due process.

D. Damages

In Carey v. Piphus, 435 U.S. 247, 259 (1978), the Supreme Court held that procedural due process rules are "meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." See also Bell v. Little Axe Independent School District No. 70, 766 F. 2d. 1391, 1409 (10th Cir. 1985). Hence, in Carey, the Court concluded that where an employee's discharge is 'justified," but procedures are deficient in some respect, the employee can recover only those damages caused by the denial of procedural due process itself. In this case, Derstein asserts that he suffered mental and emotional distress as a result of the denial of

due process, as well as consequential damages as a result of his "unjustified" termination.

Thus, in determining the measure of damages in this case, the court must first determine whether plaintiff suffered any damages as the result of the denial of due process itself. Next, the court must decide whether or not the plaintiff's termination was "justified" -- i.e., whether plaintiff would have been terminated even if he had been afforded due process. If so, plaintiff is entitled to recover only for the denial of due process itself. If, on the other hand, plaintiff's termination was not "justified," he is entitled to recover the consequential damages he suffered as a result of his termination.

While the court has already concluded that plaintiff was not afforded procedural due process, damages are not presumed to occur from that denial. Carey, 435 U.S. at 262. Rather, plaintiff must have produced evidence that his mental and emotional distress actually was

caused by the denial of procedural due process itself. Carey v. Piphus, 435 U.S. at 263. The court finds that plaintiff has met that burden.

Derstein testified as to the humiliation and distress he experienced as a result of the manner in which he was discharged. He related the difficulty and embarrassment he felt when he told his wife and others of the reasons given for his discharge, but was unable to relay any specific information because he had never been advised of the exact nature of the charges. Further, Derstein recounted the aggravation and frustration he experienced when he attempted to obtain a copy of the investigation transcript so that he might discover for himself the basis for his discharge, but instead he was referred from person to person and eventually denied the transcript.

Derstein's testimony clearly established the distress he suffered as the result of being denied the opportunity to tell his employers of 9-1/2 years "his side of the story" or to obtain

an explanation from them of the basis for their decision to terminate him. Accordingly, the court finds that plaintiff suffered damages in the amount of $10,000.00 as a result of the denial of due process itself.

The court must next decide whether defendants presented sufficient evidence to prove by a preponderance of the evidence that plaintiff would have been discharged even if proper pre-deprivation procedures had been employed. Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1265 (7th Cir. 1985); Akbar v. Fairman, 788 F.2d 1273, 1278 (7th Cir. 1986). The defendants have the burden of proof on this issue. Barberic v. City of Hawthorne, 669 F.Supp. 985, 995 (C.D. Cal. 1987); Alexander v. City of Menlo Park, 787 F.2d 1371, 1375 (9th Cir. 1986), cert. denied, 479 U.S. 1032 (1987). The rationale behind placing the burden on the defendants to show that plaintiff's termination was justified is that it is the defendant's unlawful deprivation of due process which has

made it difficult to determine what would have transpired if all parties had acted properly. Id.

Defendants have failed to meet their burden in this case. The evidence indicates that the initial decision to "investigate" Derstein's conduct was made not in response to complaints from individual employees, since no such complaints were ever made. Rather, the "investigation" was undertaken in response to a "rumor" that Sharon Neria intended to file a sexual harassment suit. Derstein was not advised of the investigation or of the results of the investigation. The judges each testified that they reviewed the investigative transcripts of the conversations recorded by Van Buren, accepted Van Buren's conclusion that the defendant was guilty of "sexual harassment" and decided sexual harassment was a serious and grievous offense for which termination was immediately justified, without ever requesting or obtaining input from the defendant or anyone

who might have suggested a different set of circumstances.

While plaintiff did not have the opportunity to dispute the allegations of "sexual harassment" prior to his termination, the allegations were substantially disputed by the plaintiff at trial. For instance, plaintiff denied that he ever tickled any of the females in the office, he denied ever "popping" their bra straps, and he claimed he never threw paper wads down anyone's blouse. Plaintiff admitted, however, that some two years prior to his termination, an attorney came into the office while plaintiff and other staff members were attempting to put together a new file cabinet. When the attorney asked what was going on, Derstein responded, "I'm screwing Sharon." Plaintiff recalled that a couple of days later Mary Wolfe advised him that Neria had been offended by his comment, so he apologized to Neria and told her he didn't mean anything by the remark. (Tr., p. 103)

Judge Jaworsky confirmed this version of the event in his testimony at trial. Jaworsky stated that Derstein and Neria came to his office and Derstein explained what had happened and said that he had only been joking. Jaworsky believed that Derstein was worried because Neria reacted negatively to the comment. In any event, Jaworsky did nothing about the incident and did not hear it mentioned again until he read it in Van Buren's transcript of her interview with Sharon Neria. Jaworsky does not recall whether he mentioned the incident to Van Buren, Seyb, or the other judges when he talked with them about the investigation. (Tr., pp. 617-19, 635.)

Plaintiff also admits to making the other isolated remarks attributed to him the transcripts, including a statement to Neil Harrison that Mary Wolfe "has a fine ass," and a remark to Mary Wolfe to the effect that it wasn't cold outside, she was just "frigid." He also admitted that "a long time ago" Nancy Brush

told him to stop touching her, but he felt that she was joking. Derstein disputes, however, that Neil Harrison ever advised him not to make sexist comments in the office. (Tr., pp. 227-229.)

The court finds Derstein's testimony to be credible and convincing. While the court does not condone the type of behavior admitted by Derstein, it is convinced that had Derstein been given the opportunity to present his side of the story, the judges would not have found Derstein's conduct to be a "serious and grievous" offense requiring immediate discharge. The court believes that Derstein would have been admonished or warned that his conduct was not acceptable and given an opportunity to correct his ways, and he may even have been removed from his supervisory position, but he would not have been terminated.

That Derstein's termination on the basis of "sexual harassment" was unjustified is further supported by the judges' letter in which they

respond to Derstein's appeal. In the letter, the judges discuss in detail the "occurrences which culminated in the termination of Mr. Derstein." (Def. Ex. B.) These "occurrences," however, are not the statements made by Derstein's co-workers in the taped interviews. Rather, the judges discuss Mr. Derstein's "apparent lack of interest and failure to keep appointed office hours," his unwillingness to handle the cases of adult probationers, and his attempts to "assume the directorship for the local office." The letter further describes the "rumor" regarding an employee's plan to bring charges of sexual harassment, which prompted the investigation by Van Buren. The judges state that they relied upon the advice of Van Buren in deciding that Derstein's offense was of a "serious and grievous" nature, requiring immediate termination, but they do not discuss the details of Van Buren's investigation.

Derstein was advised in the May 6, 1981 meeting, and in the termination letter he

received ten days later, that he was fired for "sexual harassment." He was never advised that any of the "occurrences" alleged in the judges' letter were the basis of his termination. Moreover, the evidence indicates that he was never informed of or reprimanded for any of these alleged problems. The court finds this letter significant in that it indicates the uncertainty of the judges as to the basis for Derstein's termination. Moreover, even assuming that some of the reasons given in the letter for Derstein's termination were true, they would not have been considered "serious and grievous" offenses justifying immediate termination under the provisions of the handbook.

As stated, the court is convinced that had Derstein been afforded due process he would not have been discharged. Rather, it is likely that Derstein would have been removed from his supervisory position and reprimanded for his inappropriate actions toward female workers as well as for some of the other problems mentioned

in the judges' response letter but never conveyed to Derstein. Accordingly, the court finds plaintiff is entitled to compensatory damages resulting from his wrongful termination.

Derstein presented evidence as to the damages incurred as a result of his termination. These damages included lost past and future earnings, lost medical insurance benefits, lost college instruction income, and lost retirement benefits. In calculating plaintiff's lost and future income, however, plaintiff's expert, Nolan Luke, assumed that plaintiff would have followed a different career path had he not been terminated from his CSO-II position. (Pl. Ex. 43.) Specifically, plaintiff's damage calculations assume that plaintiff, rather than Mark Frey, would have been appointed to the Corrections Counselor II position at the El Dorado Honor Camp, which Derstein interviewed for in the fall of 1981. Plaintiff's expert further assumed plaintiff's career path would

have resulted in his ultimately being appointed to the director position at the camp.

Defendants contend plaintiff's damage estimates are inaccurate because Robert Hannigan, appointing authority at the honor camp, testified that the decision not to hire Derstein as a Corrections Counselor II in 1981, as director of the camp in 1988, or for other positions he applied for during that time period, were not based upon Derstein's termination from court services for "sexual harassment." (Tr., pp. 708, 719.) For each position Derstein applied for, Hannigan explained the basis for his hiring decisions and the reasons why Derstein was not selected.

The court therefore finds that plaintiff's termination from court services played no role in Derstein's unsuccessful application for several positions at the honor camp, including the camp's director position in 1988. Accordingly, in arriving at its damage figure for lost income, the court has assumed that

plaintiff would have remained in his employment as a Court Services Officer II. With this is mind, the court finds that Derstein has suffered damages as a result of lost income in the amount of $40,000.00. In this, the court has taken into account plaintiff's incidental damages, including lost medical insurance benefits, reduced retirement benefits, lost college instruction income, and travel expenses plaintiff incurred while working in Hutchinson.

Finally, the court finds plaintiff is entitled to damages resulting from the mental and emotional distress he suffered as a consequence of his termination. There can be no question but that plaintiff's unjustified termination for "sexual harassment" left him humiliated and emotionally devastated. Plaintiff testified as to the humiliation and embarrassment he felt when he had to face family, colleagues and friends after his termination. Derstein had been active in community service groups, but after his

termination he felt that in the eyes of the community he had suddenly and inexplicably lost his professional position, and he stopped participating in those groups. Derstein testified regarding the several months he spent searching for employment, the humiliation he suffered each time he was questioned in an interview regarding the basis for his termination from court services, and of the frustration which finally led him to take a job with Wendy's, completely disrupting his career and altering his home life. The court therefore finds plaintiff suffered mental and emotional distress as a result of his unjustified termination and awards him damages of $40,000.00.

Finally, the court notes its recognition of the difficulty inherent in trying this case for all involved. No judge welcomes a case wherein the defendants are judges. Any case involving adjudication of a colleague is necessarily a difficult one. Nor has plaintiff's court-

appointed counsel drawn satisfaction from the pursuit of this case. Notwithstanding, each of us have met our responsibilities and this case is now resolved.

IT IS ACCORDINGLY ORDERED THIS ____ day of May, 1989 that the court finds for plaintiff on his claim of denial of due process and awards him damages in the amount of $90,000.00, together with the costs of this action.

Plaintiff is at liberty to file an application for attorney fees.

_____

PATRICK F. KELLY JUDGE

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

(2)

No. 90-1238

In The

Supreme Court of the United States

October Term, 1990

LESLIE R. DERSTEIN,

Petitioner,

v.

PAGE BENSON, J. PATRICK BRAZIL, and JOHN JAWORSKY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents perceive the correct issue to be whether pre-termination due process requirements are met when an employee is given general information of the nature of the charge against him, the name of a complaining party, has ten days in which to act, and has the opportunity for a full post-termination hearing?

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STATEMENT OF THE CASE

Respondents have no quarrel with petitioner's statement of facts until page seven, last paragraph. At the May 7 meeting, petitioner responded to Judge Benson and Mr. Seyb. Petitioner stated, *inter alia*: "Something fishy is going on," "I evidently had been framed," "they have been getting a lot of lies," and "if that is what it takes to get something, then I guess I will have to start lying." (Tr. 11/8/88, p. 128, Tr. 11/11/88, pp. 671-672). The judges testified petitioner was given ten (10) days from the meeting to act, out of fairness, to give petitioner an opportunity to obtain counsel and to give any other response. (Tr. 11/11/88, pp. 607, 608, 645, 673 and 674). The personnel handbook's

applicable rules dictated immediate termination. Petitioner's ex. 14, pp. 23, 24. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) was not yet decided.

Later the same day, petitioner retained attorney Gene White to represent him. Mr. White discussed the matter with Administrative Judge Page Benson and told Judge Benson "you may be able to fire Les [Derstein] for several reasons but you can't fire him for this reason, and you're doing it the wrong way." (Tr. 11/9/88, p. 284). Mr. White never attempted to obtain the transcripts. (Tr. 11/9/88, p. 285). The respondents felt they had no right to have further contact with petitioner regarding this matter because he was represented by counsel. (Tr. 11/11/88, pp. 608, 609, 626, 674, 676, 689). Petitioner remained on the job and received benefits through May 17, 1981. (Tr. 11/8/88, p. 132). Mr. White did not seek a stay of termination of petitioner's benefits pending outcome of his appeal though this opportunity was available under the personnel rules. (Tr. 11/9/88, pp. 288, 289; petitioner's ex. 14, p. 36).

On May 18, 1981, Mr. White filed an appeal letter which stated:

> The basis for the appeal is that in the 9½ years Mr. Derstein worked for the Court Services he has *never* received either an oral or written reprimand for "sexual harassment."
>
> That the enumerated "just causes for immediate discharge" are inclusive in nature and the "sexual harassment over an extended period" is not one of the enumerated just causes. Petitioner's ex. 39, p. 9.

Petitioner conceded at trial that denying receipt of a reprimand for sexual harassment is different from denying that he committed sexual harassment. (Tr. 11/9/88, p. 240). In his appeal letter, petitioner did not deny that he sexually

harassed anyone. The appeal panel did not perceive any question of fact, so there was no hearing and, in a 2-1 decision, the termination was upheld. Respondents' ex. C. After this final decision was rendered, petitioner filed a motion for hearing, contending for the first time to the appeal panel that there was a factual dispute. Respondents' ex. D. The appeal panel denied the motion unanimously, ruling the appeal document controlled, and once the final decision was rendered, the panel lost jurisdiction. Respondents' ex. E. Petitioner had further review available under Kan.Stat.Ann. § 60-2101(d), but did not pursue this avenue. (Tr. 11/9/88, p. 289, pet.'s app. p. A45). Judge Walton testified that had petitioner denied the fact of harassment in the original appeal document, a hearing would have been granted. (Depo. of Herbert Walton, pp. 74, 75). The appeal panel members were also defendants in this action, received summary judgment, and no appeal of that ruling was pursued.

RESPONSE TO DENY GRANTING THE WRIT

I. PETITIONER MISSTAKES THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS

The Tenth Circuit held that a public employee who has been accused of sexual harassment by female employees received sufficient pre-termination due process when that employee is advised of the nature of the accusations, given the name of a complainant, and has ten additional days from the time of the pre-termination meeting before benefits are terminated. Pet.'s app. A15-A17. The Circuit examined the post-termination procedures available to petitioner in determining whether the dictates of the subsequently decided *Loudermill* were met. Satisfied that the post-termination opportunity for hearing was sufficient, the Court decided that the minimal due process requirements were met.

Stripped to its essentials, petitioner's argument contends that a full adversarial hearing is required at the pre-termination hearing stage. The Tenth Circuit rejected this argument based upon this Court's ruling in *Loudermill*. Pet.'s app. A15. In *Loudermill*, this Court specifically rejected the necessity of such a hearing at the pre-termination stage where an appropriate post-termination hearing is available. 470 U.S. at 545-546. The Tenth Circuit recognized that based upon undisputed evidence an appropriate post-termination hearing was available, and petitioner does not attack this finding. If petitioner wishes this Court to modify or overrule *Loudermill* and transform Justice Marshall's concurrence to the rule (*see* 470 U.S. at 548), he should do so in a straightforward manner.

Due process is a flexible concept. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). The determination of what process

is due depends upon a case-by-case analysis. *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976), *quoting Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The competing interests involved at the pre-termination level are the employee's interest in his state employment and the ability of the government employer to make personnel decisions. *Bishop v. Wood,* 426 U.S. 341, 349-350 (1976). The pre-termination hearing is only an initial check against mistaken decisions. *Loudermill,* 470 at 545-546. In this case, the evidence was undisputed that petitioner had an opportunity for a full post-termination hearing. (Tr. 11/9/88, pp. 209-212). Furthermore, petitioner testified that even after seeing each of the transcripts, attending the depositions of each complainant, observing all discovery, and after years of litigation, he had nothing to add to what he said to the respondent judges on May 7, 1981, (Tr. 11/9/88, p. 269), reaffirming the Tenth Circuit ruling that petitioner's pre-termination due process was adequate.

Finally, in his appeal document to the appeal panel, petitioner raised no factual issues which required an evidentiary hearing. Petitioner was given full consideration of the legal issues he raised. It was only after petitioner lost on the legal issue that petitioner decided to attack the factual basis. The petitioner had the opportunity for a hearing if only he denied sexual harassment in the appeal document. Because he did not do so, the appeal panel did not hold an evidentiary hearing. The respondents had no involvement in the appeal proceedings.

CONCLUSION

These respondents knew both the complaining persons and petitioner. They knew that for several years they had morale problems in an office that contained only four Court Service officers and one secretary. After learning of the complaints about petitioner, they understood the source of the problems. Finally, after petitioner was removed, the problems evaporated. (Tr. 11/11/88, pp. 598, 632, 679).

The Tenth Circuit opinion approves reasonable actions to be taken to protect female employees from abusive supervisors such as petitioner. These respondents were satisfied after their meeting with petitioner on May 7, 1981, that they had no mistaken impressions: The complainants accused petitioner of acts which respondents believed to be sexual harassment, as well as offensive; petitioner denied what he did was sexual harassment. Subsequent events have done nothing to change their belief.

It is respectfully requested the petition be denied.

Respectfully submitted,

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